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Nos. 01-653 & 01-657

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION,

Petitioner,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,

Respondents.

ARCTIC SLOPE REGIONAL CORPORATION,
COUNCIL TREE COMMUNICATIONS, LLC, AND
VOICESTREAM WIRELESS CORPORATION,

Petitioners,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS ARCTIC SLOPE REGIONAL CORPORATION, *et al.*

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Pursuant to S. Ct. Rule 25.5, petitioners Arctic Slope Regional Corporation, *et al.*[1] submit this supplemental brief in response to the supplemental brief filed September 20, 2002 by respondents NextWave Personal Communications Inc. and NextWave Power Partners Inc. ("NextWave"). In that brief, NextWave asserts that a recent FCC Public Notice,

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[1] Effective September 1, 2002, the corporate name of petitioner VoiceStream Wireless Corporation was changed to T-Mobile USA, Inc.

issued September 12, 2002, undermines petitioners' position in this case.[2] As explained below, NextWave is mistaken.

In Auction 35, which was held before the D.C. Circuit's decision in this case, the FCC reauctioned licenses previously held by NextWave and Urban Comm-North Carolina, Inc., another bankrupt licensee. Petitioners in No. 01-657, or entities in which they have interests, were among those winning bidders. In the recent Public Notice, the FCC invites public comment on two proposals that would allow winning bidders for the NextWave and Urban Comm licenses to renounce some or all of their bids and obtain full or partial refunds of their down payments. The principal reason for the proposed action is the delay caused by this litigation, which has so far prevented the FCC from awarding licenses to the winning bidders. *See* Public Notice at 1. The FCC previously refunded a substantial portion of the winning bidders' down payments. *See id.* at 2. Now, recognizing that the ongoing delay in receiving licenses may pose hardships for many of those bidders, the FCC has decided to consider "whether it should take further action with regard to the pending applications for licenses won during Auction 35." *Id.* at 3-4.

The Public Notice thus deals solely with the *reauction* of NextWave's licenses, and has no bearing on the central issue in this case—whether Section 525 of the Bankruptcy Code prevented the FCC from *canceling* NextWave's licenses in the first place notwithstanding the FCC's determination that NextWave's continued hold on the Nation's airwaves disserves the public interest. As explained in petitioners' briefs, Section 525 does not prevent the FCC from taking such

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[2] *See* Public Notice, *Commission Seeks Comments on Disposition of Down Payments and Pending Applications for Licenses Won During Auction No. 35 for Spectrum Formerly Licensed to NextWave Personal Communications Inc., NextWave Power Partners, Inc. and Urban Comm – North Carolina, Inc.*, FCC 02-248 (Sept. 12, 2002).

regulatory action. That question is separate from the question of how the FCC will reallocate the licenses once it is able to take them back from NextWave.

Contrary to NextWave's contention, the Public Notice in no way contradicts the FCC's determination that NextWave's default on its winning bid demonstrated that it was not the licensee most likely to serve the public interest. In fact, the recent Notice is entirely consistent with the FCC's actions toward NextWave and other C-Block licensees. When NextWave encountered financial difficulties, it was given the option of surrendering some or all of its licenses in exchange for full or partial forgiveness of its remaining payment obligations. *See* Arctic Slope Br. 11-12; Reply Br. 7. In the recent Notice, the FCC is merely considering giving the Auction 35 winning bidders a similar option. Indeed, the FCC was even more generous to NextWave, which had already received its licenses when it was offered forgiveness. NextWave chose instead to default. Unlike NextWave, however, no winning Auction 35 bidder addressed by the Public Notice ever defaulted on a license condition, because these bidders were never able to receive the licenses through no fault of their own.

Thus, the FCC has consistently maintained that a licensee may not do precisely what NextWave now says it has the absolute right to do—retain licenses without complying with a legitimate regulatory condition and without ever having to pay what it promised. Indeed, the very circumstance that prompted the Notice—the delay caused by NextWave's own bankruptcy and litigation tactics—shows that NextWave's interpretation of Section 525 undermines Congress's expressed goal of using auctions to ensure "the development and rapid deployment of new technologies, products, and services for the benefit of the public * * * without administrative or judicial delays." 47 U.S.C. § 309(j)(3)(A). Section 525 should thus be properly interpreted to allow the FCC to enforce its cancellation regulations in order to carry out

Congress's intent that spectrum licenses be available—"without administrative or judicial delays," *id.*—to companies that the FCC determines will further the public interest. Otherwise, the public will continue to suffer as insolvent companies like NextWave continue to warehouse scarce spectrum in bankruptcy litigation, resulting in more delays of the sort that prompted the recent Public Notice.

To the extent the Notice is relevant to this case at all, it underscores that the proper regulation of spectrum auctions is fundamentally a matter for the FCC—not bankruptcy courts or bankrupt companies—to decide (subject, of course, to appropriate review in the Courts of Appeals). The FCC is now considering important regulatory issues regarding the reauction of the NextWave licenses, just as it earlier considered other complex regulatory issues when determining the extent to which NextWave's payment deadlines and obligations should be modified. The Bankruptcy Code does not, and cannot, prevent the FCC from exercising its regulatory authority to reclaim exclusive licenses to use the public airwaves from an entity that is not serving the public interest, in order to get the licenses into the hands of others that will.[3]

[3] Finally, the recent Public Notice belies NextWave's contention that the FCC's actions with regard to NextWave's licenses are motivated by a pecuniary desire to increase revenues for the Treasury. In light of recent market conditions, it is widely believed that the winning bids in a new reauction of those licenses would be less than the winning bids in Auction 35, which was completed in January 2001. Yet the FCC is nonetheless considering that option, just as it reauctioned the licenses returned by other C-Block licensees at a loss. *See* FCC Reply Br. 18.

CONCLUSION

For the foregoing reasons, and those in petitioners' opening and reply briefs, the judgment below should be reversed.

Respectfully submitted,

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